

**BEFORE**

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint )  
Application of Nova Telephone )  
Company and VNC Enterprises, ) Case No. 10-849-TP-ACO  
LLC Pursuant to Section 4905.402, )  
Revised Code. )

### OPINION AND ORDER

NATURE OF THE CASE:

On June 18, 2010, Nova Telephone Company (Nova) and VNC Enterprises, LLC (VNC) (together, the joint applicants) filed a joint application pursuant to Section 4905.402, Revised Code, seeking approval of a change in ownership whereby VNC will acquire control of Nova, a domestic telephone company pursuant to Section 4905.402, Revised Code. On July 14, 2010, the Commission suspended this application from automatic approval pursuant to Section 4905.402, Revised Code.

Section 4905.402, Revised Code, controls in this situation because the transaction involves a change in the ownership and control of Nova, a domestic telephone company. Section 4905.402, Revised Code, states that no person shall acquire control, directly or indirectly, of a domestic telephone company or a holding company controlling a domestic telephone company, unless that person obtains the Commission's approval. To obtain approval, that person must file an application "demonstrating that the acquisition will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge." If, after review of the application and any necessary hearing, the Commission is "satisfied that approval of the application will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge, the commission shall approve the application and make such order as it considers proper."

**THE JOINT APPLICANTS:**

Nova is an Ohio corporation, an incumbent local exchange carrier (ILEC), and a public utility subject to the Commission's jurisdiction. Nova provides local exchange telephone service and other services in the Nova and Sullivan exchanges in Ashland County, Ohio. As of June 14, 2010, Nova serves approximately 1,016 access lines in these two exchanges. The authorized capital stock of Nova consists of 150 shares, of which 87 shares are issued and outstanding and no such shares are held in treasury. Nova's largest shareholder, Swag Construction, Inc. (Swag), owns 57.47 percent of the issued and outstanding shares of Nova. The authorized capital stock of Swag consists

of 500 shares, all of which are issued and outstanding and no such shares are held in treasury. Mr. Richard L. Ringler and Mr. Walter E. Whitmore each own 250 shares of Swag. Mr. Ringler is currently the President of Nova and Mr. Whitmore is currently Nova's Vice President and Treasurer.

VNC is a Texas limited liability company with its principal place of business in Longview, Texas. VNC is owned equally by Mr. Charles D. Mattingly, Jr. and Mr. Vincent J. Godinich. VNC is a holding company and currently has no operating interests in the state of Ohio.

#### THE PROPOSED TRANSACTION:

The transaction involved in this case is described below. On June 11, 2010, Mr. Ringler and Mr. Whitmore executed a stock purchase agreement with VNC, under which Mr. Ringler and Mr. Whitmore transfer all of their shares of Swag to VNC. Immediately following the transaction, Swag will continue to own 57 percent of the outstanding shares of Nova and VNC will indirectly control Nova through its ownership of Swag. Upon closing the transaction, VNC would thereby be deemed to "acquire control" of a "domestic telephone company" within the meaning of Section 4905.402, Revised Code. As such, the transaction is expressly subject to the approval of this Commission as well as the Federal Communications Commission (FCC).

In connection with the transaction, Nova will make an offer to all of its shareholders (other than Swag) to purchase such shareholders' shares in Nova at the same price per share as Mr. Ringler and Mr. Whitmore will receive for their shares of Swag. However, the closings of any such purchases by Nova will occur after the closing of the transaction at stake in this case. Any shares purchased by Nova as a result of such offer will be treated as treasury stock and retired. As a result, the total number of Nova shares outstanding will decrease and the ownership interest of any remaining shareholders, including Swag, will increase.

#### INTERVENTION:

On June 25, 2010, Armstrong Telecommunications, Inc. (Armstrong) filed a motion to intervene in this proceeding. Armstrong notes that its earlier effort to enter into an interconnection agreement with Nova was effectively blocked when, in Case No. 09-1899 (09-1899),<sup>1</sup> the Commission granted Nova, for a two-year period, a rural exemption pursuant to 47 U.S.C. 251(f)(1) and Rule 4901:1-7-04, Ohio Administrative Code (O.A.C.). Armstrong argues that if Nova were to be acquired by VNC in this case, the financial structure of Nova may be drastically different than the financial structure

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<sup>1</sup> *In the Matter of the Application and Petition of Nova Telephone Company, Filed Pursuant to Rules 4901:1-7-04, and 4901:1-7-05, Ohio Administrative Code, Finding and Order issued April 6, 2010.*

of the company that, in 09-1899, argued for and was granted a rural exemption. Armstrong still desires to enter into an interconnection agreement with Nova, and contends that its efforts to interconnect with Nova, following Nova's acquisition by VNC, may be substantially affected if Nova is no longer the same company it claimed itself to be in 09-1899. According to Armstrong, it may be found that after the acquisition by VNC, Nova will no longer qualify for a rural exemption. On this basis, Armstrong claims that it is entitled to intervene in this transfer of control case, in order to protect its interest in interconnecting with the resulting company if and when VNC's acquisition of Nova is completed.

Beyond this, Armstrong states that it has several customers in the Nova service territory and argues that "Armstrong's customers that are served by Nova may be affected by a new company taking over services provided by Nova." On this basis, Armstrong claims that it has a substantial interest both in ensuring that customers will be sufficiently served and also to ensure Nova's continuing viability following its acquisition by VNC.

On July 12, 2010, the joint applicants filed a memorandum opposing Armstrong's motion to intervene. It is the joint applicants' position that Armstrong does not satisfy the criteria for intervention. The joint applicants argue that intervention should be denied because Armstrong: (a) will be neither adversely nor in any other way affected, by the transfer of control of Nova; (b) has no substantial interest that requires protection in this proceeding; (c) has not advanced any position relevant to the merits of this case; and (d) has not demonstrated that it would contribute in any manner to the full development and equitable resolution of factual issues. The joint applicants believe that granting Armstrong intervention would add unnecessary delay because, according to the joint applicants, Armstrong's primary expressed interest is in revisiting arguments raised and determinations made in an unrelated case, namely, 09-1899, that not only has already been decided and is now closed, but also has no relevance to the instant case. The joint applicants point out that the Commission can only terminate Nova's rural exemption in accordance with the criteria set forth in 47 USC § 251(f)(1), which are not the criteria by which the Commission must decide this case.

Upon review of all of the pleadings relating to it, the Commission finds that Armstrong's motion to intervene should be denied. Armstrong's only real self-identified interest, as relates to Nova, is Armstrong's interest in interconnecting with Nova. On balance, Armstrong has not shown how its interest in interconnecting with Nova has any relevance to or bearing on the real issues at stake in this matter. Armstrong's claims that its participation as an intervenor in this case is necessary in order: (a) to ensure that customers will be sufficiently served and (b) in order to ensure Nova's continuing viability, are completely unsupported by any allegations of fact put forward by Armstrong. As a result, such claims do not provide support sufficient to justify a grant of intervention to Armstrong in this case. For these reasons, we find that

Armstrong has not met the criteria for intervention set forth in Section 4903.221, Revised Code, and Rule 4901-1-11(B), O.A.C., and, consequently, Armstrong's request for intervention is denied.

On June 30, 2010, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene in this proceeding. The OCC holds authority to represent residential utility customers pursuant to Chapter 4911, Revised Code. Moreover, the OCC claims that it is entitled to intervention under Section 4903.221, Revised Code, because Nova's residential customers may be adversely affected by the proposed change of ownership of their incumbent local telephone company. Accordingly, the OCC contends that it meets the criteria of Section 4903.221(B), Revised Code, and the corresponding Commission Rule 4901-1-11(B)(1)-(4), O.A.C. The OCC recites the criteria by which the Commission determines whether to grant intervention, found in Section 4903.221(B), Revised Code, as follows:

- (a) The nature and extent of the prospective intervenor's interest;
- (b) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (c) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (d) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

The OCC contends that it meets the criterion of having a "real and substantial interest" for intervention under Rule 4901-11(A)(2), O.A.C. By virtue of its statutory authority to represent residential utility consumers, the OCC claims that it has a unique interest that entitles it to intervention under Rule 4901-1-11(B)(5), O.A.C. The rule requires the Commission to consider the "extent to which the person's interest is represented by existing parties." The OCC points out that no other parties represent residential customers' interests.

On July 15, 2010, the joint applicants filed a response to the OCC's motion to intervene. The response indicates that the joint applicants do not oppose the OCC's motion to intervene. The response states that the joint applicants respect the OCC's consumer advocacy role and believe that the proposed transfer of control of Nova will promote the public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge as required by Section 4905.402(B), Revised Code.

Upon review of the motion and of all of the pleadings relating to it, the Commission determines that the OCC has a real and substantial interest in this

proceeding and that it is so situated that disposition of this proceeding, without the OCC's intervention, may impair the OCC's ability to protect that interest. Therefore, the OCC's motion to intervene is granted at this time.

DISCUSSION:

In its motion to intervene, and memorandum in support thereof, the OCC argues that the joint applicants have not demonstrated that VNC's acquisition of control of Nova will promote the public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge, as required by Section 4905.402(B), Revised Code. The OCC contends that nothing in the application, as originally filed, shows that VNC has the expertise to operate a telephone company. The OCC points to the fact that neither VNC, nor Mr. Mattingly and Mr. Godinich, appear to have experience in providing local exchange service, much less in operating an ILEC. Moreover, the application, as originally submitted, notes the OCC, does not describe the telecommunications service(s) with which VNC may have experience. According to the OCC, VNC's experience as a telephone company is crucial because, according to the application, VNC may replace Nova's upper management as early as three months after the transaction is completed, and replace other employees as early as six months after taking control of the company. The OCC claims that this proposed timeframe for replacing personnel contradicts the joint applicants' claim that the transaction will be virtually transparent to the customers.

The OCC states that the application, as originally filed, contains no financial information regarding VNC. The OCC regards this as an important issue because VNC will apparently focus on replacing Nova's current copper infrastructure with fiber, but does not disclose, in the application as originally filed, how VNC will finance its infrastructure replacement plans. Finally, the OCC also claims that, given VNC's plan to implement a bundled price for current as well as future services, the proposed transaction may adversely affect rates that customers now pay for various services.

In their response to OCC's motion to intervene, the joint applicants address the OCC's stated concern that the proposed transaction may adversely affect rates that Nova's customers pay for existing services. The joint applicants reiterate the statement in their application that VNC has no present or future plans to seek rate increases. Moreover, the joint applicants contend that the bundled pricing contemplated by VNC would provide Nova's customers with more, not fewer, price options.

On August 27, 2010, the OCC filed a letter in this acknowledging that, after the OCC's motion to intervene was filed, the joint applicants provided the OCC with additional information regarding the proposed transaction. The OCC's August 27, 2010 letter further indicates that, based on the information provided, the OCC withdraws its objections to the proposed transaction.

On August 16, 2010, the joint applicants filed a supplement to their application (the supplement). The expressed intent of the supplement is to provide additional background information relative to VNC's technical, managerial, and financial expertise, and to elaborate on certain statements made by the joint applicants regarding their plans to upgrade Nova's network.

In the supplement, VNC states that, although it has not owned or operated a local exchange carrier (LEC), it has owned and operated several Internet Service Providers (ISPs), IP networking, and prepaid cellular service companies. VNC states in the supplement that it "envision[s] Nova as an IP-based fiber network." VNC states that it has ten years of technical experience designing, building, and operating IP-based networks and that such experience "will ensure a seamless upgrade of Nova's network over the next several years." VNC also explains that it has customer service experience as a result of serving more than 500 customers of its former ISPs. VNC explains that it handled all customer service issues in-house, including both technical and billing concerns.

Within the supplement, VNC claims that it has the managerial and financial expertise to operate Nova. VNC states that it has owned and operated a number of companies in addition to the above-mentioned ISPs and, as a result of this diverse experience, is prepared to apply new concepts and strategies to Nova's operations to the benefit of Nova's customers. The supplement provides additional information about VNC's plans to manage Nova's operations. This includes background information concerning the new full-time employee that VNC has engaged to become the Director of Operations for Nova following the planned acquisition by VNC. This person, Charles Curtis, brings 23 years of experience in the telecommunications industry in consulting, regulatory valuations, software development and strategic planning, with an emphasis on regulatory, financial, and billing aspects of rural ILECs, wireless carriers, and CATV and ISP providers. Mr. Curtis will also serve as Nova's primary regulatory contact to the Commission and, although located outside of Ohio, will travel to Nova on an as-needed basis, at a minimum of three to five business days per month. VNC will also engage the resources of Aegis Consulting Group, LLC (Aegis), a four-person consulting group, of which Mr. Curtis is the managing member. Aegis provides financial, regulatory, and planning services for small and mid-size ILEC, CLEC, CATV, ISP, and CMRS providers. Moreover, the supplement indicates that VNC intends to continue to rely upon Nova's current highly experienced staff. In particular, VNC expects to promote to the position of Market Operations Manager, one current Nova employee who has over forty years experience in the telecommunications industry. Additionally, VNC will also hire a Plant Manager to assist the Market Operations Manager and be directly involved in the deployment of the infrastructure upgrades.

Within the supplement, VNC has provided additional information and timetables associated with its plans to upgrade Nova's network. In language that is intended to supersede certain language that had appeared in the original application, VNC states that it will achieve its infrastructure upgrades in several steps, each step of which will build on the prior step. The entire project, says VNC in the supplement, will be designed and implemented in phases. This approach, VNC believes, will result in better services being delivered faster and more affordably. Within the supplement, VNC has made the following specific commitments:

- (1) VNC commits to undertake, and to complete within approximately 90 days of the closing of the transaction, a detailed engineering analysis of the current central office and outside plant.
- (2) VNC commits to replace certain electronics to achieve higher DSL data rates over existing copper plant, and to, depending upon the engineering analysis, complete the replacements by approximately April 2011.
- (3) VNC commits to, beginning in Spring 2011 (depending upon weather conditions), overbuild and extend current fiber optic trunk lines using "bonding" technology to push higher DSL data rates over existing copper.
- (4) VNC commits to sectionally migrate from copper to all fiber plant.
- (5) VNC commits to offer high speed data, video, and other available services to customers at the time of migration. The migration from copper to fiber will be pursued subsequent to changing out current subscriber central office and remote electronics. This initial upgrade will relieve the current bandwidth demand issues in the Nova serving area.
- (6) VNC commits to complete the replacement of the electronic equipment by, barring unforeseen circumstances, Spring 2011. VNC estimates that the cost of upgrading existing electronics to be between \$500,000 and \$600,000. Subsequently, VNC intends to begin converting copper loops to fiber in a multi-phased project timeline, which will conclude in 2013. VNC estimates the subsequent fiber replacement project, for all planned areas, to be between \$4 million and \$5 million. VNC intends to pursue financing for the fiber conversion project through the Rural Utilities Service.

CONCLUSION:

Upon review, the Commission finds that the information provided in the supplement sufficiently addresses both the staff's and the OCC's concerns. Upon review of the record as a whole, including the supplement to the application filed on August 16, 2010, the Commission is satisfied that approval of the application will promote the public convenience, particularly in light of the infrastructure upgrades and the commitments made by VNC in the supplement. Further, we believe that the transaction will result in the provision of adequate service and reasonable rates. We, therefore, find that the transaction should be approved at this time without further proceedings.

Based on the record in this proceeding, including the supplement and commitments made by VNC within it, the Commission concludes that VNC is financially, technically, and managerially qualified to acquire control over Nova. The record reflects that the proposed transaction will result in customer service and service quality that meets current service standards. Even upon approval and completion of the transaction, the Commission retains jurisdiction to ensure that Nova's customers continue to receive adequate and reliable service. Additionally, the Commission retains jurisdiction over the reasonableness of Nova's rates, terms, and conditions of basic local exchange service. Likewise, Nova is still subject to commission oversight and regulation as provided in Ohio law and the Commission's rules.

Our approval of the joint application is expressly contingent upon the representations of the joint applicants, including those made in the supplement. If the representations of the joint applicants change or the transaction is not closed, the Commission reserves the right to take the necessary action to guarantee that the *transaction would still result in the provision of adequate service, reasonable rates, and promote the public convenience.* Additionally, to the extent that the FCC adds conditions to its review of the proposed transaction, the Commission reserves the right to revisit the terms under which it is approving this transaction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On June 18, 2010, the joint applicants filed an application seeking approval of a change in ownership whereby VNC will acquire control of Nova.
- (2) The Commission engaged in its review of the joint application pursuant to Section 4905.402, Revised Code, based on its finding that the application pertains to the change of control of a domestic telephone company or a holding company controlling a domestic telephone company.



- (3) On July 14, 2010, the Commission suspended this application from automatic approval pursuant to Section 4905.402, Revised Code.
- (4) Pursuant to Section 4905.402, Revised Code, the Commission determines that no hearing is necessary in this proceeding.
- (5) The joint application should be approved in accordance with this Opinion and Order. The joint application, as discussed in this Opinion and Order, will promote the public convenience and result in the provision of adequate service at reasonable rates, rentals, tolls, or charges, as set forth in Section 4905.402, Revised Code.
- (6) The Commission retains continued oversight authority over this transaction and the ongoing implementation in accordance with this Opinion and Order.

It is, therefore,

ORDERED, That Armstrong's motion to intervene be denied and that the OCC's motion to intervene be granted. It is, further,

ORDERED, That the proposed change in of ownership whereby VNC will acquire control of Nova be approved as described in this Opinion and Order. It is, further,

ORDERED, That the joint applicants comply with the terms and directives of this Opinion and Order. It is, further,

ORDERED, That, within three days of the transaction closure, the joint applicants formally notify the Commission when the proposed change in ownership whereby VNC will acquire control of Nova has occurred. It is, further,

ORDERED, That our approval of the joint application, to the extent set forth in this Opinion and Order, does not constitute state action for purposes of antitrust law. It is not our intent to insulate the companies from the provisions of any state or federal laws that prohibit the restraint of trade. It is, further,

ORDERED, That, except as specifically provided for or clarified in this Opinion and Order, nothing shall be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Alan R. Schriber, Chairman



Paul A. Centolella



Valerie A. Lemmie



Steven D. Lesser

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Cheryl L. Roberto

DEF/dah

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**SEP 01 2010**



Renee J. Jenkins  
Secretary